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In the Supreme Court of the United States

OCTOBER TERM, 1982

BAXTER REICH, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA, PETITIONER

v.

EVA REHNER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether 18 U.S.C. 1161 grants the States authority to impose liquor licensing requirements and fees upon Indian tribal entities or tribal Indians acting under tribal authorization engaged in the business of selling liquor within an Indian reservation.

TABLE OF CONTENTS

	Page
The interest of the United States	1
Statement	4
Introduction and summary of argument	6
Argument:	
I. 18 U.S.C. 1161 does not grant the States authority to require a tribal vendor of liquor to obtain a State liquor license in order to operate on a tribal Reservation	9
II. The Twenty-First Amendment does not grant the States regulatory jurisdiction over tribal Indians on their Reservations	22
Conclusion	27

TABLE OF AUTHORITIES

Cases:

Bryan v. *Itasca County*, 426 U.S. 373 ..... 7, 12, 13, 17, 18, 19, 21, 22, 25
California v. *United States*, 438 U.S. 645 20
Central Machinery Co. v. *Arizona Tax Commission*, 448 U.S. 160 ..... 2, 8
Collins v. *Yosemite Park & Curry Co.*, 304 U.S. 518 ..... 8, 23, 26
Confederated Salish & Kootenai Tribes v. *Moe*, 392 F. Supp. 1297, aff'd, 425 U.S. 463 7
Draper v. *United States*, 164 U.S. 240 10
EPA v. *State Water Resources Control Board*, 426 U.S. 200 ..... 18, 19
Hancock v. *Train*, 426 U.S. 167 ..... 18, 19
McClanahan v. *Arizona State Tax Commission*, 411 U.S. 164 ..... 2, 8, 13, 20, 24, 25
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 ..... 12, 13
Mescalero Apache Tribe v. *Jones*, 411 U.S. 145 ..... 10, 16, 25
Mescalero Apache Tribe v. *New Mexico*, 630 F.2d 724, vacated, 450 U.S. 1036, on remand, 677 F.2d 55, cert. granted, No. 82-331 (Nov. 15, 1982) 6

Cases—Continued: Page

Minnesota v. *United States*, 305 U.S. 382 22
Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 7
Montana v. *United States*, 450 U.S. 544 11
Morton v. *Mancari*, 417 U.S. 535 9
People v. *Bray*, 105 Cal. 344, 38 P. 731 ..... 9, 10
Ramah Navajo School Board, Inc. v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982) 6
Santa Rosa Band of Indians v. *Kings County*, 532 F.2d 655 26
State v. *Lindsey*, 133 Wash. 140, 233 P. 327 9
United States v. *John*, 437 U.S. 634 22
United States v. *Mazurie*, 419 U.S. 544 ..... 10, 11, 12
United States v. *State Tax Commission*, 412 U.S. 363 ..... 8, 23, 24, 26
United States v. *State Tax Commission*, 421 U.S. 599 ..... 24, 25
United States v. *New Mexico*, 590 F.2d 323, cert. denied, 444 U.S. 832 2
Warren Trading Post v. *Arizona Tax Commission*, 380 U.S. 685 ..... 2, 8
Washington v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 6
White Mountain Apache Tribe v. *Arizona*, 649 F.2d 1274 6
White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 6
Williams v. *Lee*, 358 U.S. 217 8
Williams v. *United States*, 327 U.S. 711 22
Worcester v. *Georgia*, 31 U.S. [6 Pet.] 515 25
Zaste v. *North Dakota*, AL-75-29 (D. N.D. January 31, 1977) 2

Constitution, statutes and rule:

United States Constitution:
Article I, Section 8, Cl. 3 24
Article II, Section 2, Cl. 2 24
Twenty-First Amendment 5, 6, 8, 22, 23, 24, 25
Act of June 30, 1834, ch. 161, 4 Stat. 732 9
Act of August 15, 1876, 25 U.S.C. 261 ..... 2, 4, 8

Constitution, statutes and rule—Continued	Page
Assimilative Crimes Act, 18 U.S.C. 13	22
Clean Air Act:	
Section 118, 42 U.S.C. 1857f	18
Section 118, 42 U.S.C. (Supp. IV) 7418	19
Federal Water Pollution Control Act Amendments of 1972:	
Section 313, 33 U.S.C. 1323	19
Section 313, 33 U.S.C. (Supp. V) 1323	19
Major Crimes Act, 18 U.S.C. 1153	22
Reclamation Act of 1902, ch. 1093, Section 8, 32 Stat. 390	20
Public law No. 277, 67 Stat. 586	12
Public Law No. 280, 67 Stat. 588	12, 14-15, 20, 21, 26
Section 2, 18 U.S.C. 1162	14, 20, 21, 26
Section 4, 28 U.S.C. 1360	7, 20, 21, 26
Section 4(a), 28 U.S.C. 1360(a)	21
18 U.S.C. 1151	10
18 U.S.C. 1152	22
18 U.S.C. 1154	4, 11, 22
18 U.S.C. 1154(a)	9
18 U.S.C. 1154(c)	10
18 U.S.C. 1155	10
18 U.S.C. 1156	10, 11, 22
18 U.S.C. 1161	*passim*
25 U.S.C. 564q	21
25 U.S.C. 757	21
25 U.S.C. 899	8, 9
Cal. Bus. and Prof. Code § 23000 (West repl. 1964 & Cum. Supp. 1982) *et seq.*	4
§ 23300	26
§ 23301	26
§ 23320(21)	5
§ 23817	5
§ 23954.5	5
§ 24070	5
§ 25602(b)	26
§ 25602(c)	26

Constitution, statutes and rule—Continued	Page
§ 25602.2	26
§ 25658	26
Cal. Penal Code § 398 (West 1954)	26
9th Cir. R. 25	5
Miscellaneous:	
25 Fed. Reg. 3343 (1960)	4
37 Fed. Reg. 1253-1254 (1971)	11
78 Interior Dec. 39 (1971)	2
H.R. No. 1055, 83d Cong., 1st Sess. (1953)	15
H.R. Rep. No. 775, 83d Cong., 1st Sess. (1953)	16, 17
Hearings on H.R. 1055 Before the Comm. on Interior and Insular Affairs, 83d Cong., 1st Sess. (1953)	16
Hearings on H.R. 1055 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 83d Cong., 1st Sess. (1953)	15
1 C. Kappler, *Indian Affairs, Laws and Treaties* (2d ed. 1904)	4
S. Rep. No. 722, 83d Cong., 1st Sess. (1953)	17
State Legal Jurisdiction In Indian Country: Hearings on H.R. 459, H.R. 3235 and H.R. 3624 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 82d Cong., 2d Sess. 29-34 (1952)	14
U.S. Dep't of the Interior, *Federal Indian Law* (1958)	8

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v.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THE INTEREST OF THE UNITED STATES

The present case arises under 18 U.S.C. 1161, which exempts from an array of otherwise applicable federal criminal proscriptions attaching to the sale of liquor in Indian country any transaction carried out "in conformity both with the laws of the State in which [it] occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register." The question presented is whether this federal statute grants State governments the power to require tribal Indians or tribal enterprises that intend to sell alcoholic beverages on trust lands within an Indian Reservation pursuant to tribal authorization to secure State licenses.

The United States has a special relationship with the Indian tribes generally. See *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 168-169 (1973). In addition, Eva Rehner, respondent in this case, is federally licensed as an Indian trader pursuant to 25 U.S.C. 261. The United States has an interest in protecting its authority to regulate trading on an Indian Reservation. See *Central Machinery Co.* v. *Arizona Tax Commission*, 448 U.S. 160, 163 (1980); *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 690 (1965).

The United States has consistently interpreted 18 U.S.C. 1161 as not granting States regulatory licensing power over tribal Indians. In 1971, the Solicitor of the Department of the Interior issued an opinion concerning the application of Montana's liquor licensing laws to a tribal Indian on Rocky Boy's Reservation, 78 Interior Dec. 39, concluding that Section 1161 does not grant the States licensing jurisdiction over tribal Indians doing business on Reservations. In 1977, the United States filed suit on behalf of the Mescalero Apache Tribe to prevent the State of New Mexico from imposing its liquor licensing requirements on the Inn of the Mountain Gods, a tribal resort on its Reservation. In that case the United States District Court for the District of New Mexico and the United States Court of Appeals for the Tenth Circuit held that 18 U.S.C. 1161 did not grant the State licensing jurisdiction over the tribal enterprise; this Court denied review. *United States* v. *New Mexico*, 590 F.2d 323 (10th Cir. 1978), cert. denied, 444 U.S. 832 (1979).[1] And, beginning in 1978, the United States participated as amicus curiae in the proceedings before the Ninth Circuit in the present case. Again, the government argued that Section 1161 does not grant States licensing jurisdiction over tribal Indians or tribal enterprises engaging in liquor transactions on Indian Reservations.

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[1] A similar result was reached in *Zaste* v. *North Dakota*, AL-75-29 (D.N.D. Jan. 31, 1977), an unreported case in which the United States did not participate.

Section 1161 is a statute of nationwide applicability affecting all Indian Reservations. These Reservations differ in location, size, tribal organization, and non-Indian presence. Many of the largest Reservations, such as the Navajo Reservation, which occupies an area in excess of 20,000 square miles, have highly developed tribal governments and extremely limited non-Indian presence within Reservation boundaries. Because Section 1161 is a nationwide statute, an interpretation of its terms binds all Reservations regardless of local circumstances. Petitioner's suggestion (Pet. Br. 80-81) that this Court decide this case in his favor based upon local circumstances not shown to have been within the contemplation of Congress is accordingly of particular concern to the United States.

A conclusion that 18 U.S.C. 1161 embodies a grant of authority to require State licensure of tribal Indians and tribal entities selling liquor under tribal authorization would significantly undermine federal policies favoring tribal self-determination and economic development of Indian Reservations. Such jurisdiction would grant to the States the power to select the tribal member or, indeed, tribal entity, who may engage in liquor transactions on Reservations, even for purposes of transactions involving only tribal members. Imposition of licensing requirements would also create a substantial, if not insurmountable, barrier to tribal economic development efforts based upon resorts and retail establishments, especially in sparsely populated areas.

The United States is not insensitive to the policy considerations advanced by the State. It is our view, however, that the relevant State interests do not require and cannot support the proposed interpretation of Section 1161 as a source of plenary State regulatory authority. Section 1161 itself requires the tribal ordinance permitting Reservation liquor transactions to be certified by the Secretary of the Interior. Legitimate State concerns respecting on-Reservation liquor sale activities may be ac-

commodated through the certification process and the cooperation of interested federal, State and tribal authorities.

STATEMENT

1. Eva Rehner is a member of the Pala Band of the Mission Indians. She operates a general store located on trust land within the Pala Reservation in San Diego County, California. The Pala Reservation was created by an Executive Order of the President of December 27, 1875, which set apart the land "for the permanent use and occupancy of the Mission Indians in Lower California." 1 C. Kappler, *Indian Affairs, Laws and Treaties* 820-821 (2d ed. 1904). Rehner is licensed by the Bureau of Indian Affairs of the United States Department of the Interior to trade on the Reservation under the provisions of the Act of Aug. 15, 1876, ch. 289, 25 U.S.C. 261.

Under longstanding federal law, introduction of liquor into Indian country is generally prohibited. 18 U.S.C. 1154. This prohibition does not apply, however, to "any act or transaction * * * in conformity both with the laws of the State in which [it] occurs and with an ordinance duly adopted by the tribe having jurisdiction * * *." 18 U.S.C. 1161. Pursuant to 18 U.S.C. 1161, the Pala Band adopted an ordinance permitting the "introduction, sale or possession of intoxicating beverages * * * within the Indian country under the jurisdiction of the Pala Band * * *." 25 Fed. Reg. 3343 (1960). This ordinance was approved by the Secretary of the Interior on April 11, 1960. *Id.*

In the mid-1970's Rehner determined to sell distilled spirits at her general store, but was informed by the California State Department of Alcoholic Beverage Control that she had first to obtain an off-sale general license from the Department. Off-sale general licenses make up one of the classes of liquor licenses issued by the State authorities, see Cal. Bus. & Prof. Code § 23000 *et seq.* (West repl. 1964 & Cum. Supp. 1982). An application for a new license in this category must be accompanied by a

fee of $6,000 which is deposited into the general fund of the State treasury. Bus. & Prof. Code § 23954.5 (West Cum. Supp. 1982). In addition, the State imposes an annual license fee of $350. Bus. & Prof. Code § 23320(21) (West Cum. Supp. 1982). The number of licenses that may be issued within a county is limited by a quota determined by reference to population. Bus. & Prof. Code § 23817. Off-sale general licenses are, however, transferable. Bus. & Prof. Code § 24070 (West Cum. Supp. 1982). Rehner alleges that such licenses were being sold on the open market for approximately $55,000 in 1977.

2. On February 10, 1977, Rehner filed suit in the United States District Court for the Southern District of California seeking a declaratory judgment that she was not required to obtain a California State liquor license to sell distilled spirits at her store and seeking an order directing the California authorities to inform wholesalers that sale of liquor to her was permissible. The district court granted petitioner's motion to dismiss, ruling that 18 U.S.C. 1161 required Rehner to obtain a State license to sell liquor at her store.

On appeal, the petitioner claimed that 18 U.S.C. 1161 granted the State jurisdiction to require State licensing of tribal Indians wishing to sell liquor on the Pala Reservation. He did not assert that the Twenty-First Amendment to the United States Constitution conferred such power on the States. This appeal was originally argued in the spring of 1979 before a three-judge panel of the Ninth Circuit. Before any opinion was rendered by that panel, two other cases presenting related questions involving tribes in the State of Washington, came before the court of appeals.[2] The three cases were then scheduled together for argument to an en banc panel of 11 members. See 9th Cir. R. 25.

The en banc court, with Judge Goodwin dissenting, reversed the judgment of the district court in this case.

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[2] The additional cases were: *"Muckleshoot Indian Tribe* v. *Washington*, No. 79-4403 (9th Cir.) and *Tulalip Tribe* v. *Washington*, No. 79-4404 (9th Cir.).

The court held that 18 U.S.C. 1161 did not confer licensing jurisdiction on the States (Pet. App. 8-A to 27-A). Upon consideration of the additional issues raised by the companion cases, the court of appeals remanded for consideration in light of *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), respecting the questions whether the State of Washington may tax tribal sales of liquor to non-tribal members and impose record-keeping requirements (Pet. App. 27-A to 30-A). See page 26 note 23, *infra*. The court of appeals also rejected Washington's contention that the Twenty-First Amendment to the United States Constitution granted the States regulatory jurisdiction over tribal liquor transactions on Indian Reservations (Pet. App. 30-A to 32-A).

INTRODUCTION AND SUMMARY OF ARGUMENT

It is useful to begin by specifying the issues this case does and *does not* present. First, unlike many of this Court's recent decisions, there is here no question respecting State taxation of Reservation activities of non-Indians. Compare *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Nor does this case involve general State regulation of non-Indian activities on Indian Reservations. Compare generally *White Mountain Apache Tribe* v. *Arizona*, 649 F.2d 1274 (9th Cir. 1981); *Mescalero Apache Tribe* v. *New Mexico*, 630 F.2d 724 (10th Cir. 1980), vacated, 450 U.S. 1036 (1981), on remand, 677 F.2d 55 (10th Cir. 1982), cert. granted, No. 82-331 (Nov. 15, 1982).[3] Finally, there is no issue

[3] Some of the amici interpret the court of appeals' decision as holding that Indian Tribes have exclusive power to license non-Indians to engage in liquor transactions on reservations. See, e.g., Amicus Br. for Minnesota, et al. 10-13. While there is introductory language in the court of appeals' opinion (Pet. App. 1-A) that literally may be so read, the cases before the court did not present that

concerning State power to enforce its liquor laws and policies by means other than through a business privilege licensing requirement.[4]

Instead, the only question presented here is whether the State has authority to require a tribal Indian or a tribal entity to obtain a State liquor license for the privilege of engaging in liquor transactions within the confines of the tribal Reservation. Thus, this case returns the Court to an area of law last visited in 1976: the direct regulatory power of States over tribal Indian activities on their Reservations. See *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Bryan* v. *Itasca County*, 426 U.S. 373 (1976). In *Moe* the Court affirmed the decision of a three-judge district court holding that the State of Montana lacked authority to "require a member of [an Indian tribe] who sells cigarettes on the [tribal] Reservation to possess its cigarette dealer's license." *Confederated Salish & Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1317 (D. Mont. 1975), aff'd, 425 U.S. 463, 480-481 (1976). In *Bryan*, this Court held that the grant of general civil adjudicatory jurisdiction made to particular States in Section 4 of Public Law 280, 28 U.S.C. 1360, did not "confer upon the States general civil regulatory

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question and it is our view that the court of appeals properly left that question undecided. We note that this case involves a tribal Indian doing business on trust land within her Reservation and that *Tulalip* and *Muckleshoot* involved tribal liquor authorities exercising a monopoly on liquor sales within their Reservations. The question whether an Indian tribe can authorize a non-Indian to engage in Reservation liquor transactions without obtaining an otherwise required State license is not presented here.

[4] The court of appeals held that "so long as Mrs. Rehner complies with the certified tribal ordinance authorized by 18 U.S.C. 1161, she need not obtain a California license to sell liquor in Indian country" (Pet. App. 36-A). The court of appeals did not address respondent's demand that the petitioner be directed to inform wholesalers that liquor could properly be sold to her, and that aspect of the case appears to have been rendered moot by the enactment of legislation by the State. See Br. in Opp. 4-5, A-1.

powers, including taxation, over reservation Indians" (426 U.S. at 390).

The basic rule is that " 'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.' " *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 170-171 (1973) (quoting U.S. Dep't of the Interior, *Federal Indian Law* 845 (1958)); see *Williams* v. *Lee*, 358 U.S. 217, 220 (1959). As a general matter, therefore, this Court's decisions establish that States lack regulatory jurisdiction to impose licensing requirements on tribal Indians or entities doing business on Reservations. In this particular case, moreover, the federal exclusion of State power to imposing a license requirement respecting Rehner's on-Reservation commercial activities is especially clear, for Rehner is *federally* licensed as an Indian trader pursuant to 25 U.S.C. 261—a scheme which leaves "no room * * * for state laws imposing additional burdens on traders." *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 690 (1965). See also *Central Machinery Co.* v. *Arizona Tax Commission, supra*, 448 U.S. at 165-166.

The only question that this case properly presents in its present posture, is whether special provisions of federal law governing liquor transactions alter this allocation of regulatory power and grant the States regulatory jurisdiction they would not otherwise possess simply because liquor is involved. As shown below, 18 U.S.C. 1161 does not contain a jurisdictional grant to the States. The Twenty-First Amendment to the United States Constitution, while increasing the States' powers within their jurisdiction, does not extend the territorial scope of that jurisdiction. *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938); *United States* v. *State Tax Commission*, 412 U.S. 363, 378 (1973). Accordingly, neither of these provisions grants the States regulatory jurisdiction to license tribal Indians and entities to engage in liquor transactions within the confines of their Reservation.

ARGUMENT

I

18 U.S.C. 1161 DOES NOT GRANT THE STATES AUTHORITY TO REQUIRE A TRIBAL VENDOR OF LIQUOR TO OBTAIN A STATE LIQUOR LICENSE IN ORDER TO OPERATE ON A TRIBAL RESERVATION

1. Since 1834, federal law has prohibited liquor transactions involving tribal Indians. Act of June 30, 1834, ch. 161, 4 Stat. 732. As it stood in 1953, the federal prohibition, which forms a part of the criminal code, had several parts. First, the sale of liquor to tribal Indians anywhere in the United States was prohibited. 18 U.S.C. 1154(a).[5]

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[5] Specifically, the law prohibited sale to an Indian to "whom an allotment of land has been made" while legal title to the land remained in the United States, to an Indian "who is a ward of the Government" or to an Indian "over whom the Government * * * exercises guardianship." The federal liquor prohibition applicable outside Indian country accordingly did not establish a racial classification but, instead, was a manifestation of the special relationship between tribal Indians and the federal government. See *Morton* v. *Mancari*, 417 U.S. 535, 552-554 (1974).

In contrast to the federal prohibition, State laws which also prohibited sales of liquor to Indians appear to have established a true racial classification. Indeed, the case petitioner cites for the proposition that the States historically exercised authority to regulate Indian transactions involving liquor was based upon such a statute. *People* v. *Bray*, 105 Cal. 344, 38 P. 731 (1894). In that case a non-Indian was prosecuted under State law for selling liquor to an assimilated Indian, with no tribal affiliation, not living on any Reservation. The State court held that the State prohibition applied to Indians as a race. Whatever the validity of such a State law under modern standards of equal protection, this State precedent hardly serves as a basis for the assertion of State regulatory jurisdiction over a tribal Indian engaged in liquor transactions on a Reservation. Of all the State cases cited by petitioner (Pet. Br. 40), only one explicitly concerns State jurisdiction over on-Reservation activities, and that case involved the Reservation activities of non-Indians. *State* v. *Lindsey*, 133 Wash. 140, 233 P. 327 (1925). There the State prosecuted a non-Indian for manufacturing liquor within the exterior confines of a Yakima Reservation. The court found jurisdiction

Second, the introduction of liquor into Indian country was prohibited. *Ibid.* Third, the federal statutes prohibited possession of intoxicants in Indian country. 18 U.S.C. 1156.[6] When Congress set out in 1953 to eliminate these federal liquor restrictions which discriminated against Indians, it did not simply repeal these criminal statutes. Rather, Congress overlaid the existing prohibitions with 18 U.S.C. 1161, which is the subject of the dispute in this case, thereby establishing a division of jurisdictional authority congruent with the ordinary distribution of jurisdictional power respecting the activities of Indians.[7]

Outside Indian country, where tribal Indians are generally subject to nondiscriminatory State law, see *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149

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based on this Court's ruling in *Draper* v. *United States*, 164 U.S. 240 (1896) and explicitly found that "no personal or property right of an Indian" was involved in the case. 233 P. at 328. The remaining cases cited by petitioner involved laws similar to that considered in *People* v. *Bray*, *supra*, prohibiting sale to Indians on the basis of race.

The cases cited by petitioner rest upon statutes enacted before repeal in 1953 of the absolute federal ban on liquor sale and possession in Indian country, and therefore could in no event lend support to petitioner's thesis (Pet. Br. 38-40) that Congress was aware of, and acquiesced in, State exercise of regulatory authority over on-Reservation liquor trade. Because federal law and the State laws in question prohibited sale of liquor to tribal Indians in Indian country at that time, no question as to State authority to require licensure or to regulate the terms and conditions of sale could have arisen.

[6] In 1949, the definition of Indian country was modified for the purposes of the federal liquor prohibitions. The general definition, set out at 18 U.S.C. 1151, was amended to exclude "fee-patented lands in non-Indian communities or rights of way through Indian reservations." 18 U.S.C. 1154(c) and 1156. In *United States* v. *Mazurie*, 419 U.S. 544 (1975), the Court considered the application of the term "non-Indian communities."

[7] Another federal liquor prohibition, not affected by enactment of 18 U.S.C. 1161, outlaws intoxicants at Indian schools "in the former Indian Country." 18 U.S.C. 1155. That statute is not involved in this case.

(1973), Congress in Section 1161 simply made the federal liquor prohibitions inapplicable.[8] Within Indian country, however, where tribes exercise inherent tribal sovereignty, the criminal prohibitions on liquor sale and possession were lifted to the extent that particular transactions were undertaken "in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior and published in the Federal Register" 18 U.S.C. 1161. But this conditional exemption from the otherwise applicable federal criminal sanctions was in favor of the Tribes, not the State. As the Court explained in *United States* v. *Mazurie*, 419 U.S. 544, 547 (1975), Section 1161 is

> local-option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian Country, so long as state law was not violated.[9]

2. a. The court of appeals correctly concluded that 18 U.S.C. 1161 does not *grant* the States authority to require purveyors of liquor under tribal authority to obtain a State license as a condition of operation. On its face, as the

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[8] The pertinent portion of 18 U.S.C. 1161 provides that the provisions of 18 U.S.C. 1154 and 1156 "shall not apply within any area that is not Indian country."

[9] In *Mazurie*, the Court also concluded that the delegation of authority to the tribes in 18 U.S.C. 1161 was constitutional in the context of tribal regulation of a non-Indian doing business on the Reservation. 419 U.S. at 557. The Court also noted that tribes have some measure of inherent authority within the Reservation over non-Indians who do business with tribal members or who affect the internal or social relations of tribal life. *Ibid.* See also *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981).

The tribal ordinance of the Wind River Reservation at issue in *Mazurie*, *supra*, required non-Indians to obtain both State and tribal liquor licenses. In contrast, tribal members were required only to obtain a tribal license. 37 Fed. Reg. 1253-1254 (1971).

court of appeals observed (Pet. App. 13-A), Section 1161 is not "a jurisdictional grant to anyone; it simply provides for the inapplicability of certain federal criminal statutes under specified conditions." It is significant, moreover, that Congress enacted Section 1161 as part of the federal penal code, Title 18. Here, as in *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 384 n.11 (addressing civil jurisdiction under Public Law 280), it is plain that "[Section 1161] would be expected to be codified in Title 25, governing Indian affairs if * * * state regulatory power over Indian reservations were being granted." [10] The most that can be said is that Section 1161 reflects Congress' intention that the law of the State in which an on-Reservation liquor transaction occurs provide substantive limits upon conduct that may be undertaken under the jurisdiction of the tribe without incurring liability under the federal criminal law.[11]

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[10] In *Bryan* v. *Itasca County*, the Court also considered the title of the legislation and of the codified enactment to be significant indicators of congressional intent. 426 U.S. at 384 n.11. Here, of course, the introductory title of the leigslation, "An Act to eliminate certain discriminatory legislation against Indians in the United States," Public Law No. 277, 67 Stat. 586, contains not the slightest suggestion that tribal authority over on-Reservation activities was to be subjected to State jurisdiction. Similarly the title prescribed by Congress for Section 1161 itself, "Application of Indian Liquor Laws" contains no such suggestion.

[11] As to the tribes themselves, there was no need for Section 1161 actually to bestow regulatory authority respecting reservation liquor transactions—at least when conducted by tribal members or entities —for the tribes possess important "attributes of sovereignty over both their members and their territory." *United States* v. *Mazurie*, *supra*, 419 U.S. at 557. It was thus sufficient as to the tribes that Section 1161 removed the pre-existing federal law impediment to exercise of tribal authority. Of course, in *Mazurie*, 419 U.S. at 547, 556-558, the Court recognized that Section 1161 did bestow upon the tribes authority to regulate liquor transactions by non-Indians in Indian country, reserving the question whether, as to such non-Indians, the inherent authority of the tribe would be a sufficient basis for the exercise of tribal authority. Cf. *Merrion* v. *Jicarilla*

b. Nor can it be said that Section 1161 *recognizes* State authority to impose licensing requirements upon tribal members selling liquor under tribal authority (compare page 12 note 11, *supra*). The longstanding policy of the United States to leave tribal Indians free from State jurisdiction and control has been recognized by this Court. *McClanahan* v. *Arizona Tax Commission*, *supra*, 411 U.S. at 168. In deference to this policy, the Court has required a direct and unambiguous indication of congressional intent to depart therefrom in considering claims that a particular statute grants the States jurisdiction over the Reservation activities of tribal Indians. *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 392. Doubtful expressions are resolved against claims of State authority. *Ibid.* In light of these cannons of construction, petitioner's claim that Section 1161 recognizes State licensing authority over Reservation vendors of liquor is unsound.

First, as the court of appeals observed (Pet. App. 11-A to 15-A), insofar as Section 1161 recognizes the authority of the States to legislate respecting the sale of liquor in Indian country, that authority is not identical to that of the tribes, and does not extend to regulation, administration of State law standards, or to licensing. As to the tribes, the authority recognized (see page 12 note 11, *supra*) is described by the statute in terms of exercise of "jurisdiction," whereas the authority of the State is merely described as the application of subsisting "laws"—norms of conduct. The absence of any parallel reference to State jurisdiction is a telling indication that Congress did not expect or intend the States actually to administer a regulatory scheme affecting Reservation liquor transactions occurring under the "jurisdiction" of the tribe.

Congress' understanding that State and tribal authority were not congruent is also reflected in the statutory de-

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Apache Tribe, 455 U.S. 130, 140-141, 147 (1982). As we explain in the ensuing text, neither the language nor the legislative history of Section 1161 suggests that an identical grant of authority was made to the States.

scriptions of the instruments by which a State and a tribe were respectively to exercise their authority. The tribe is to enact a specific ordinance for this purpose, which must be specially certified by the Secretary. Enactment of such ordinances was, of course, necessary because under the pre-existing statutory scheme there was no reason for the tribes to have legislated on this subject. Congress appears to have intended that such newly-enacted ordinances form the plenary authority under which Reservation liquor transactions might take place. By contrast, Congress contemplated that the State's authority be given effect through the general requirement of conformity with "the laws of the State." It thus appears that Congress did not expect that the States would undertake any special legislation or any administration of its liquor laws to apply them to Indian Reservation transactions; rather, it was sufficient that the pre-existing body of State law was available to provide the substantive standards governing sale of alcoholic beverages.

Second, the legislative history of Section 1161 provides no support for petitioner's contention that Congress intended to subject reservation liquor sales under tribal authority to the licensing authority of the States. A predecessor to Section 1161 was considered during the 82d Congress in 1952. The original proposal of the Department of the Interior was to tie the repeal of federal criminal prohibitions on sale of liquor to Indians to a broader proposal (a forerunner of Public Law 280), also then pending, to transfer criminal jurisdiction to the States. See *State Legal Jurisdiction In Indian Country: Hearings on H.R. 459, H.R. 3235 and H.R. 3624 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 82d Cong., 2d Sess. 29-34 (1952). In the next Congress, that course was abandoned and the two proposals were separated. As ultimately enacted the liquor provision, 18 U.S.C. 1161, was designed to apply nationwide to all Indian Reservations; the statute transferring criminal jurisdiction to the States, Public

Law 280, 18 U.S.C. 1162, on the other hand was made applicable only to designated Reservations and States.

As originally introduced in the 83d Congress, H.R. 1055, 1st Sess. (1953) was applicable only within the State of Arizona. See *Hearings on H.R. 1055 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. (March 18, 1953), reproduced at Pet. Br. App. A-4 to A-7, A-8.[12] In its original form the bill provided simply that the federal Indian liquor laws "shall not hereafter apply to any transaction within an Indian reservation in the State of Arizona which is in conformity with the ordinances of the tribe or tribes having jurisdiction over the said reservation" (Pet. Br. App. A-6). Commissioner of Indian Affairs Dillon S. Myer testified at the hearings in support of an amended version of H.R. 1055 that in essential respects resembles Section 1161 as enacted. He explained that the sole purpose of the proposal was to eliminate federal legislation that discriminated against Indians (Pet. Br. App. A-15, A-17). As proposed by Commissioner Myer, the bill rendered the federal liquor prohibitions entirely inapplicable outside Indian country, as well as to

> any * * * transaction within any area of Indian country over which the State lacks full criminal jurisdiction that is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior and published in the Federal Register.

Pet. Br. App. A-18 to A-19. Commissioner Myer thus made explicit the general understanding that the State lacked jurisdiction upon Indian Reservations, and that rather than granting such jurisdiction to the States, the preferred ap-

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[12] So far as we are aware these hearings are not officially published. They have been reproduced in the appendix to petitioner's brief on the merits. "Pet. Br. App." denotes that appendix.

proach was to mandate conformity with the substantive requirements of State law as a condition of exemption from federal criminal sanctions. He explained (Pet. Br. App. A-21; emphasis added):

> What [the proposed statute] does is to eliminate, I believe, all the statutes regarding prohibition on the use of liquor whether on Indian country or outside, *and provide for tribal ordinances in case they do not want liquor on reservation areas, where state laws do not apply.*[13]

The bill as reported favorably by the House Committee substantially conformed to the recommendations of the Department of the Interior. See H.R. Rep. No. 775, 83d Cong., 1st Sess. 2-3 (1953); *Hearings on H.R. 1055 Before the Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. (June 2, 1953), reproduced at Pet. Br. App. A-70. The House Report makes no mention whatever of imposition of any grant of State jurisdiction over activities on Indian Reservations or State authority to require licensure. The Report includes the favorable Report of the Interior Department upon the bill reflecting that liquor transactions upon Reservations would be exempted from special federal criminal sanctions if made "in conformity with the ordinances of the tribes con-

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[13] Read in context, the additional remarks of Commissioner Myer stressed by petitioner (Br. 34-35) are not to the contrary. Commissioner Myer's statement that "we certainly do not intend to try to revise state laws regarding Indians or anyone else" (Pet. Br. App. A-26) was made in response to questions about the authority of the States to apply their laws to govern off-Reservation sales of liquor to Indians.

Petitioner's reliance on Congressman Patten's statement (Pet. Br. App. A-69) that "the Indians would still have to comply with State law in every regard * * *" is misplaced. That remark was made in the context of discussion of a possible repeal of 18 U.S.C. 1155, an act that prohibits liquor on lands embracing Indian schools in "former Indian Country." See page 10 note 7, *supra*. Former Indian Country is by definition outside any Reservation. Accordingly, absent contrary provisions federal law, tribal Indians are subject TO state jurisdiction at such locations. See *Mescalero Apache Tribe* v. *Jones*, *supra*.

cerned and * * * *not contrary to State law.*" H.R. Rep. No. 775, *supra*, at 3 (emphasis added). The bill passed the House swiftly with little no debate, and was reported favorably by the Senate Committee without further hearings. Although the Senate Report indicated that actual sales could be restricted under substantive state law, S. Rep. No. 722, 83d Cong., 1st Sess. 1 (1953), there is no suggestion that State licensure could be required. And the Senate Report, like the House Report, reflects the Interior Department's view that the legislation would permit sales in Indian country that are "in conformity with the ordinances of the tribes concerned and are not contrary to state law." S. Rep. No. 722, *supra*, at 2. This formulation makes clear that Congress had no intent to subject tribal sales to State regulatory or administrative jurisdiction or to require State licenses, but only to invoke the substantive corpus of State law as a set of standards limiting tribal discretion in regulating liquor sales.[14]

Here, as in *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 381, the complete absence of any indication in the legislative history of any intention to effect "a sweeping change in the status of tribal government" by "confer[ring] upon the States an authority to [administer regulations affecting] Indians or Indian property on reservations" is telling evidence that no such change was intended.

3. The State argues (Br. 18-26), however, that statutory recognition of State authority to adopt general laws affecting the sale of liquor that are binding with respect to Reservation sales cannot logically be confined to those State laws that establish substantive standards for sale, and must accordingly extend to State licensing laws. This contention is flawed for several reasons.

First, as we have explained (pages 13-17), the language and legislative history of Section 1161 both suggest that

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[14] Most importantly, of course, the State prohibition laws were thus given effect, as were State standards governing the actual sale of liquor (as opposed to the seller)—for instance prohibitions on sales to minors, and restrictions upon hours of sale.

Congress withheld from the States any grant of jurisdiction to actually apply their laws to on-Reservation sales under tribal authority. Moreover, especially because Section 1161 was not on its face a direct grant of authority to any party, but only a limitation upon the reach of the federal criminal law, the natural reading of the phrase "in conformity with the laws of the State" is that only the substantive standards of those laws are to apply and not the licensing requirements of State law. In this context it was unnecessary for Congress to expressly negate any inference that State licensing authority was recognized; it is sufficient, that Congress nowhere conferred such authority. By contrast, recognition of State authority to adopt substantive standards to be applied through the federal criminal law did not entail any separate grant of authority (see page 22, *infra*). Petitioner's contention is thus contrary to the plain language of Section 1161.

Moreover, because application of State licensing requirements to tribal sellers of liquor on a Reservation pursuant to tribal authority is a markedly greater intrusion upon traditional notions of tribal sovereignty than the application of the substantive requirements of State law, any ambiguity in the statutory text should be resolved against recognition of State licensing authority. *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 381, 390.

Hancock v. *Train*, 426 U.S. 167 (1976), and *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976), are instructive in this regard. In those cases, decided at the same Term as *Bryan*, this Court concluded that language in environmental protection statutes expressly requiring federal facilities to comply with State antipollution requirements did not subject such facilities to State permit or licensing provisions.[15] Because a clear

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[15] In *Hancock* the Court considered the effect of Section 118 of the Clean Air Act, which then provided (42 U.S.C. 1857f):

> Each department, agency, and instrumentality of the executive, legislative and judicial branches of the Federal Government

and unambiguous congressional mandate is needed to subject federal installations to regulation by States, this Court concluded in each case that the statutory direction to comply with State requirements did not subject federal facilities to State permitting authority. So, too, in this case, the analogous congressional reference to acts or transactions "in conformity with" State law should not be read to subject tribal Indians to State licensing power.[16] Instead, 18 U.S.C. 1161 should be read, as the statutes involved in *Hancock* and *EPA* were read, to require, as a matter of federal law, that liquor sale transactions be made in accordance with State substantive

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(1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

In *EPA* v. *State Water Resources Control Board* the Court considered Section 313 of the Federal Water Pollution Control Act Amendments of 1972, the language of which was then essentially identical to the analogous provision of the Clean Air Act. 33 U.S.C. 1323.

We note that Congress subsequently accepted the invitations extended in *Hancock* (426 U.S. at 198) and *State Water Resources Control Board* (426 U.S. at 227-228) by amending the federal air and water pollution statutes to subject federal facilities to State permitting requirements. See 33 U.S.C. (Supp. V) 1323; 42 U.S.C. (Supp. IV) 7418. Congress thus validated the Court's conclusion (*Hancock, supra*, 426 U.S. at 198) that it would speak unequivocally if it wished to subject the United States to State permitting requirements. In light of this Court's decision in *Bryan* v. *Itasca County, supra*, Congress may equally be held to the requirement of plain speaking in determining whether the States have been authorized to enforce their licensing requirements upon Indian Reservations.

[16] Because, unlike the statutory provisions considered in *Hancock* and *State Water Resources Control Board* (see note 15, *supra*), Section 1161 contains no affirmative requirement of conformity with State law, but merely sets up such conformity as a condition for exemption from federal criminal proscriptions, the absence from Section 1161 of any grant of authority to the States to impose license requirements is especially clear.

standards but not subject to State licensing or permitting authority.[17]

b. As the court of appeals observed (Pet. App. 15-A to 21-A), the absence from Section 1161 of any grant of authority to the States to enforce their licensing requirements against Reservation liquor vendors operating under tribal authority is highlighted by a comparison of that statute with other federal laws that do accord the States varying measures of jurisdiction over the Reservation affairs of tribal Indians. On the one hand, Section 1161 may profitably be compared with Public Law 280, 18 U.S.C. 1162 and 28 U.S.C. 1360, enacted by the 83d Congress on the very day it enacted Section 1161.

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[17] Contrary to the petitioner's contention (Br. 8-9), *California* v. *United States*, 438 U.S. 645 (1978), does not suggest that State licensing requirements are, under Section 1161, applicable to liquor vendor operators under tribal authority. To be sure, in that case the Court held that Section 8 of the Reclamation Act of 1902, ch. 1093, 32 Stat. 390, which directs the Secretary of the Interior to proceed "in conformity with" State law in carrying out the provisions of that Act, subjected the Bureau of Reclamation to State permit requirements respecting the appropriation and distribution of water for a federal dam project. But this conclusion rested heavily upon the historical background of federal deference to State water law, 438 U.S. at 653-663, and specific legislative history reflecting an intention to subject the Bureau to State procedures, *id.* at 665-670. Here, by contrast, the general policy of Congress has been to the contrary: to leave the reservation activities of tribal Indians free from State control, *McClanahan* v. *Arizona Tax Commission*, *supra*, 411 U.S. at 168, and neither the language nor the legislative history of Section 1161 reflects any intention to impose State license requirements. In any event, the issue in *California* v. *United States* was whether the Bureau of Reclamation must comply with the substantive provisions of State law; no issue was raised as to the applicability of the State's permit mechanism—the Bureau had actually applied for such a permit and contested by litigation only the enforceability of the permit conditions. 438 U.S. at 647. Moreover, *California* is to be distinguished because Section 8 of the Reclamation Act is a direct command to the Secretary to follow State law, whereas Section 1161 merely shields from federal criminal sanctions conduct taken under a governing tribal ordinance and in conformity with State law.

Public Law 280, of course, grants enumerated States general criminal and private civil adjudicatory jurisdiction in some or all of the Indian country within their borders. 18 U.S.C. 1162 and 28 U.S.C. 1360 both explicitly declare that "each of the States [enumerated] shall have *jurisdiction* * * *" in respect of matters within their scope. (emphasis added). Thus, the 83d Congress was perfectly capable of making clear its intention to confer authority upon the States in explicit terms when it wished to do so. On the other hand, because of the absence of the requisite clarity of congressional intention, the Court has recognized that separate language in Section 4(a) of Public Law 280, 28 U.S.C. 1360(a), providing that "those civil laws of [the enumerated States] that are of general application to private persons or private property shall have the same force and effect within [the designated areas of] Indian country as they have elsewhere within the State[s] * * *" does *not* authorize the exercise of "general state civil regulatory control over Indian reservations." *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 384, 388-389, 390. The Court held that the quoted language merely authorizes the State courts to apply State law as a rule of decision in the private civil actions over which jurisdiction was conferred by the introductory clause of Section 1360. 426 U.S. at 384. As we have explained (pages 11-17) this Court's reasoning in *Bryan* is equally applicable to the present case.

As the Court stressed in *Bryan* (426 U.S. at 387-390) the Congress that enacted Public Law 280 (and Section 1161) also enacted several termination acts, the language of which indicates that Congress well knew how to subject an Indian tribe to the full range of State civil regulatory authority. The termination acts provide that "the laws of the several States *shall apply* to the tribe and its members *in the same manner as they apply to other citizens or persons within their jurisdiction.*" 25 U.S.C. 564q and 757 (emphasis added). The difference between this language and the bare requirement of "conformity * * * with the laws of the State" imposed by Section 1161 is striking. The statutes are to be read *in pari materia*,

Bryan, supra, 426 U.S. at 390. Plainly, Congress did not by enacting Section 1161 confer upon the States authority to apply its liquor laws to Reservation sales by tribal Indians under tribal authority "in the same manner as may apply to other citizens"; it merely required conformity with the substantive provisions of State law.

As the court of appeals explained (Pet. App. 21-A to 24-A), incorporation of substantive State standards into federal criminal statute in this manner is a familiar device previously employed by Congress when jurisdiction is not to be transferred to the States. The Assimilative Crimes Act, 18 U.S.C. 13, for example, is made applicable in some circumstances to offenses committed by tribal Indians on reservations. See 18 U.S.C. 1152; *Williams* v. *United States*, 327 U.S. 711 (1946). More directly, the Major Crimes Act, 18 U.S.C. 1153, provides that crimes enumerated therein committed by Indians in Indian country "shall be defined and punished in accordance with the laws of the State in which such offense was committed" to the extent not defined by federal law. No grant of State jurisdiction was created by these statutes. See *Williams* v. *United States, supra*, 327 U.S. at 714; *United States* v. *John*, 437 U.S. 634, 651 (1978). See, also, *Minnesota* v. *United States*, 305 U.S. 382 (1939), construing 25 U.S.C. 357. Thus, Section 1161 follows an historic pattern. The statute contemplates that the substantive standards of State law will be incorporated into the federal criminal sanctions against liquor on Indian Reservations contained in 18 U.S.C. 1154 and 1156. It does not provide that the standards will be enforced by the State through the application of license requirements.

II

THE TWENTY-FIRST AMENDMENT DOES NOT GRANT THE STATES REGULATORY JURISDICTION OVER TRIBAL INDIANS ON THEIR RESERVATIONS

In this Court, petitioner claims that the Twenty-First Amendment to the United States Constitution confers

upon the States regulatory jurisdiction over liquor activities of tribal Indians or entities within the confines of an Indian Reservation.[18] As early as 1938, *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938), and as recently as 1973, *United States* v. *State Tax Commission*, 412 U.S. 363, 378 (1973) ("*State Tax Commission I*"), however, this Court has held that under the Twenty-First Amendment a State's territorial jurisdiction to regulate the sale of liquor or to impose licensing requirements reaches only as far as its pre-existing jurisdiction.

In *Collins*, California had reserved taxing jurisdiction within certain areas of Yosemite National Park at the time it conveyed those areas to the United States; otherwise jurisdiction rested exclusively in the United States. See 304 U.S. at 525, 530. Because of the express reservation of taxing jurisdiction, the State's authority to tax liquor transactions within the areas of the park granted by the State was sustained. *Id.* at 534-536. On the other hand, the Court held that the State lacked authority to regulate liquor traffic or require liquor licenses within the park. *Id.* at 533-534. The Court rejected California's contention that the Twenty-First Amendment empowered it to exercise the disputed authority, reasoning that, while "the Amendment may have increased 'the state's power to deal with [commerce in liquor] . . ., it did not increase its jurisdiction.'" 304 U.S. at 538 (quoting with approval the conclusion of a three-judge district court). Because the State had no authority to regulate commerce in alcohol *within the Park* before the ratification of the Twenty-First Amendment, the enhanced power afforded the State by that provision did not create such jurisdiction. *Ibid.*

In *State Tax Commission I*, *supra*, *the* Court reaffirmed the holding of *Collins*, holding that, notwithstand-

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[18] As indicated above (page 5), petitioner did not present this contention in the court of appeals. It was, however, considered by the court of appeals in response to the submission of the State of Washington in the companion cases (see page 6, *supra*).

ing the Twenty-First Amendment, the State had no authority "to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into" military bases over which the United States exercised exclusive jurisdiction. 412 U.S. at 373-377. The Court reiterated that the Twenty-First Amendment increased the power of the States within the area of its jurisdiction but not the geographical reach of that jurisdiction. 412 U.S. at 378. On the other hand, the Court made clear (*id.* at 379-381) that as to military bases within the concurrent jurisdiction of the State, reliance on the Twenty-First Amendment was not necessary to support the exercise of State jurisdiction over liquor—the only question remaining was whether some provision of federal law affirmatively barred the exercise of State authority. In sum, the Twenty-First Amendment simply has no bearing upon the territorial reach of the State's jurisdiction to regulate commerce in liquor.[19]

After a remand to the trial court for disposition of the issues unresolved in *State Tax Commission I*, *in United States* v. *State Tax Commission*, 421 U.S. 599 (1975) (*"State Tax Commission II"*), the Court struck down the disputed State liquor tax as applied to federal reservations subject to concurrent State jurisdiction on the ground that the tax was unconstitutionally imposed upon an instrumentality of the United States. The Court re-

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[19] The petitioner attempts to distinguish *Collins* and *State Tax Commission I* (Br. 87-88) as based upon the authority of the United States over its "real property and instrumentalities, such as national parks or military reservations," explaining that "Congress' power to regulate liquor traffic in Indian country stems from its power over Indian people and their affairs, not their land or instrumentalities." The attempted distinction is artificial. Congress' power respecting Indian tribes is plenary and rests upon Article I, Section 8, Cl. 3 and Art. II, Section 2, Cl. 2 of the Constitution. See *McClanahan* v. *Arizona Tax Commission*, *supra*, 411 U.S. at 172 n.7. The authority of the United States extends without distinction to the Reservations set aside for the benefit of the Indians, legal title to which is held in trust by the United States, and to the Indian tribes and their members.

jected the State's contention that the Twenty-First Amendment abolished the immunity of federal instrumentalities from State taxation in the area as to commerce in liquor, describing as "patently bizarre" and "extraordinary" the "suggest[ion] that the Twenty-first Amendment abolished federal immunity." The language and history of that Amendment are equally devoid of support for the novel contention that the States were thereby granted plenary jurisdiction to legislate in this area respecting Indian Reservations.[20]

The authority claimed by petitioner accordingly cannot be sustained. The State here seeks to enforce its licensing requirement against a tribal Indian operating within a Reservation under tribal authority. Neither that licensing requirement nor a licensing fee can be justified as necessary to regulate transportation of liquor from the

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[20] Citing *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), petitioner argues (Br. 87 n.12) that the second *State Tax Commission* case is inapposite because the federal instrumentality analysis has been rejected in Indian cases. We do not suggest that respondent is a federal instrumentality and for that reason constitutionally immunized from State licensing requirements. On the other hand, *Mescalero Apache Tribe* v. *Jones*, itself reflects the sharp distinction the Court has observed between State authority as to the Reservation affairs of tribal Indians and State authority respecting off-Reservation activities. 411 U.S. at 147-155. Indeed, the Court there recognized the "historic *immunity* from state and local control" of "Indian tribes and their reservation lands." 411 U.S. at 152 (emphasis added). And it is not inapt to describe as an immunity the longstanding policy of the United States of " 'leaving Indians free from state jurisdiction and control' " (*McClanahan* v. *Arizona Tax Commission*, *supra*, 411 U.S. at 168, quoting *Rice* v. *Olson*, 324 U.S. 786, 789 (1945)). See also *Worcester* v. *Georgia*, 31 U.S. [6 Pet.] 515, 557 (1832) ("The Cherokee Nation * * * is a distinct community * * * in which the laws of Georgia can have no force.") This "historic immunity," although analytically distinct from the special immunity from State taxation of federal instrumentalities, is no more lightly to be set aside absent a clear indication that that result was intended. See *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 392.

Reservation to areas within State jurisdiction. See *United States* v. *State Tax Commission*, *supra*, 412 U.S. at 376-377; *Collins* v. *Yosemite Park & Curry Co.*, *supra*, 304 U.S. at 533.[21]

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In closing, we note that the State of California is not powerless to enforce its State liquor policies against tribal Indians with respect to their activities on a Reservation. As a Public Law 280 State (see 18 U.S.C. 1162), California may prosecute an Indian for violation of criminal proscriptions that do not rest upon an underlying license requirement or the terms of a license. For example, the proscriptions against sale of liquor between 2 a.m. and 6 a.m., Cal. Penal Code § 398 (West 1954) and against sale to minors, Bus. & Prof. Code § 25658, would appear to be enforceable against Indian sellers.[22] In addition, expressions of State liquor policy in the general civil laws of the State such as those that govern the tort liability of purveyors of alcohol for tortious acts committed by those who consume it, see, e.g., Bus. & Prof. Code §§ 25602(b) and (c), 25602.2 (Cum. Supp. 1982), would be applicable as rules of decision in private civil actions brought in State court against an individual Indian under the civil jurisdiction conferred by Public Law 280, 28 U.S.C. 1360. In addition, the State authorities remain free to cooperate actively with the Secretary of the Interior, the United States Attorneys and the tribal governments to insure that the substantive requirements of State law are not flouted.[23] This may be accomplished through the exercise

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[21] We note that concerns about the location of liquor establishments (see Pet. Br. 70) are, in the context of Reservation activities, legitimately the concern of tribal government. See *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655 (9th Cir. 1975).

[22] By contrast a misdemeanor prosecution under Bus. & Prof. Code § 23301 would be barred because the State lacks authority to apply the license requirement of Section 23300 to Reservation vendors of alcohol acting under tribal authority.

[23] We understand that upon remand (see page 6, *supra*) the companion case below, *Muckleshoot Indian Tribe* v. *Washington*, was settled by an agreement among the parties.

of the Secretary's statutory authority to certify tribal ordinances, the sanctions available to the tribes against their members and permittees and, where necessary, through invocation of the available federal criminal sanctions.[24] What the petitioner cannot do is to require respondent to seek permission from the State and to pay a license fee for the privilege of engaging in liquor transactions on the Pala Reservation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[24] Resort to federal criminal prosecution is obviously the enforcement mechanism directly contemplated by Congress in framing Section 1161 as an exemption from the otherwise applicable federal liquor laws. Although resort to prosecution is likely to be reserved for extreme cases, any contention that this enforcement mechanism is inadequate must be directed to a legislative forum rather than this Court. See page 19 note 15, *supra*.

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